

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 1059 of 1996

For Approval and Signature:

Hon'ble MR.JUSTICE J.M.PANCHAL

and

Hon'ble MR.JUSTICE M.H.KADRI

- =====
1. Whether Reporters of Local Papers may be allowed to see the judgements?
 2. To be referred to the Reporter or not?
 3. Whether Their Lordships wish to see the fair copy of the judgement?
 4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
 5. Whether it is to be circulated to the Civil Judge?

SARADARSINH NAGARSINH

Versus

STATE OF GUJARAT

Appearance:

MR PM VYAS for Petitioner

Mr. D.P. Joshi, APP, for Respondent No. 1

CORAM : MR.JUSTICE J.M.PANCHAL and

MR.JUSTICE M.H.KADRI

Date of decision: 05/05/99

ORAL JUDGEMENT (Per: Panchal, J.)

1. The appellant is convicted under Section 18 of the Narcotic Drugs & Psychotropic Substances Act, 1985 ('NDPS Act' for short), and sentenced to R.I. for ten years as well as fine of Rs.1,00,000 in default R.I. for six months by the learned Additional Sessions Judge,

Kheda, Camp: Anand, in Special Case No.7 of 1995, vide judgment and order dated June 21, 1996, as he was found in possession of opium. He has challenged his conviction in this appeal.

2. Mr. F.A. , who was Police Inspector, LCB, Anand, received information on June 2, 1992 that some persons belonging to Rajasthan were to bring opium and sell the same near bus-stand of village Boriavi as well as other nearby villages. On receipt of said information, he called panchas and informed them about information received by him. He left LCB office in the company of panchas and other police personnel in a government jeep and came near Boriavi canal. He spotted a person coming on a cycle and apprehended him. On enquiry being made, Mr. Gohil learnt that his name was Sardarsinh Nagansinh Sisodiya of village Biravali, Taluka Gangadhar, of Rajasthan State. On search of his person, substance kept in a plastic bag which was concealed beneath under-garment was found. The substance found smelt like opium. It was weighed in presence of panchas with the help of scale and it was found that the weight of the substance found was 1 Kg. On enquiry being made, the appellant could not produce any permit or licence authorising him to possess opium. From the opium found, 100 gms. of opium was taken as sample and after sealing the same with sealing wax in a plastic bag, slips containing signatures of panchas were affixed on it. Seal bearing signature of Police Office, Anand, was also affixed on the sealed packet. Thereafter, the said sample was sent for analysis to the Laboratory. Further search on person of the accused resulted into recovery of Rs.500 in cash. Atlas cycle on which he was riding was also attached. Mr.Gohil thereafter filed a complaint with the officer in-charge of Anand Rural Police Station against the accused. It was investigated by PSO of Anand Rural Police Station, Mr. Amarsinh Motisinh. The report received from the Laboratory indicated that the substance analysed was opium. On completion of investigation, the appellant was chargesheeted for the offence punishable under Section 18 of the NDPS Act. As the case is exclusively triable by a Special Judge, the case was committed to the Sessions Court, Kheda, for trial. The learned Additional Sessions Judge, Kheda, Camp: Anand, to whom the case was made over for trial, framed charge at Exh.7 against the appellant for the offence punishable under Section 18 of the NDPS Act. The charge was read over and explained to the appellant, who pleaded not guilty to the same and claimed to be tried. Therefore, the prosecution examined (1) Jagannath Devaji Sadak, P.W. No.1, at Exh.10, (2) Shaburbhai Abdulbhai Vora, P.W.2, at

Exh.13, (3) Fulsinh Amarsinh Gohil, P.W. 3, Exh.15, (4) Amarsinh Motisinh, P.W.4, at Exh.20, and (5) Babubhai Kanchibhai, P.W.5, at Exh.22, to prove the case against the appellant. The prosecution also produced documentary evidence such as panchanama of search of person of the appellant at Exh.14, complaint filed by Mr. F.A. Gohil, Police Inspector, LCB, Anand, at Exh.16, report received from the Forensic Science Laboratory at Exh.19, etc. to bring home guilt to the appellant. After the recording of evidence of the prosecution witnesses was over, the appellant was generally questioned on the case by the learned Additional Sessions Judge and his statement under Section 313 of the Code of Criminal Procedure, 1973, was recorded. In his statement, the appellant claimed that the case sought to be made out against him was false and he was innocent. However, he did not lead any evidence in defence, but produced written arguments at Exh.25. In the written arguments, the appellant pleaded that it was not proved by the prosecution that he was in possession of opium without permit or licence and, therefore, he should be acquitted. It was also claimed therein that the mandatory provisions of Sections 42, 50, 52, 55, and 57 of the NDPS Act, were not complied with and, therefore, the prosecution case against him should be dismissed.

3. On appreciation of evidence, the learned Additional Sessions Judge held that it was proved by the prosecution that the appellant was found in possession of 1 Kg. of opium on June 2, 1992 without permit or licence. The learned Additional Sessions Judge further deduced that there was neither breach of provisions of Section 42 nor breach of the provisions of Section 50 of the NDPS Act. The learned Additional Sessions Judge concluded that the so-called breach of provisions of Sections 52, 55 and 57 of the NDPS Act, has not caused any prejudice to the appellant. In the ultimate decision, the learned Judge convicted the appellant as mentioned earlier giving rise to the present appeal.

4. Mr. P.M. Vyas, learned counsel for the appellant, contended that it is not proved by the prosecution that search of person of the appellant resulted into recovery of opium and, therefore, conviction recorded by the learned Additional Sessions Judge should be set aside. It was claimed that there is breach of the mandatory provisions of Section 42 as well as Section 50 of the NDPS Act and, therefore, conviction should be set aside. Lastly, it was contended that the prosecution has not led satisfactory evidence to establish that the sample taken was kept in safe custody

before it was sent to the Forensic Science Laboratory for analysis and, as possibility of tampering with the same is not ruled out, benefit of doubt should be given to the appellant.

5. Mr.D.P. Joshi, learned counsel for the State Government, pleaded that the fact that the appellant was found in possession of opium without permit or licence is amply proved not only by the evidence of police officers, but also by independent witness, namely, Jagannath Devaji Sadak and, therefore, the well founded finding recorded by the learned Judge to the effect that the appellant was found in possession of opium without permit or licence should not be disturbed by the Court in the present appeal. It was stressed that the evidence of Mr. F.A. Gohil establishes that before search of person of the appellant, the appellant was informed that he had right to be searched in presence of a gazetted officer or nearest Magistrate, but the appellant did not require Mr. Gohil to take him either before the nearest Gazetted Officer or Magistrate for the purpose of search and as there is no breach of Section 50 of the NDPS Act, the conviction should not be set aside by the Court. What was claimed was that all the requirements of the NDPS Act were complied with by the Investigating Officer before making search of person of the appellant and, therefore, the learned Judge was justified in convicting the appellant under Section 18 of the NDPS Act. It was also stressed that after the sample was sealed, it was kept in safe custody and the evidence led by the prosecution establishes beyond reasonable doubt that there was no possibility of tampering with the same, as a result of which conviction of the appellant recorded by the learned Additional Sessions Judge should be confirmed by this Court.

6. We have been taken through the entire evidence on the record by the learned counsel for the parties. Submission that opium was not found from the possession of the appellant on June 2, 1992 and, therefore, conviction should be set aside, is devoid of any merits. The evidence of Jagannath Devaji Sadak recorded at Exh.10 shows that he was serving at the relevant time as Head Constable, LCB, Anand, and he was also with Mr. Gohil when the person of the appellant was searched. The witness has clearly stated in his deposition that on search being carried out, opium was found concealed beneath the under-garment of the appellant. Though this witness was cross-examined searchingly by the learned counsel for the appellant, nothing was brought on the record of the case to establish that the assertion made

by the said witness in examination in chief to the effect that opium was found from the possession of the appellant, was untrue. Again, Shaburbhai Abdulbhai Vora who was examined at Exh.13 has testified before the Court that he was called on June 2, 1992 at LCB Office, Anand, and had acted as a panch witness. He has clearly stated before the Court that from the possession of the appellant one kilogram opium was found by Mr. Gohil in his presence as well as in presence of other police personnel. We may state that the evidence of this witness has almost gone unchallenged. The evidence of panch witness is not only corroborated by panchanama which is produced on the record of the case at Exh.14 but also by the evidence of other witnesses examined by the prosecution. The evidence of Mr. Gohil, who had received information and who had arranged raid, also clearly establishes that on June 2, 1992, opium was found from the possession of the appellant. The evidence of Mr. Gohil stands amply corroborated by his complaint Exh.16. It was never the case of the appellant that he had either permit or licence authorising him to possess opium. Under the circumstances, we are of the view that the finding recorded by the learned Judge to the effect that the opium was found from the possession of the appellant on June 2, 1992 without permit or licence is eminently just and deserves to be upheld. The contention that there is breach of mandatory provisions of Section 50 of the Act has no substance at all. The appellant has failed to point out any breach of any particular condition of Section 50 of the NDPS Act. Prosecution witness, Mr. Gohil, has specifically stated in his evidence that he had complied with mandatory requirements of Section 50 of the NDPS Act. This witness has testified before the Court that he had informed the appellant about his right of being searched either before a gazetted officer or before a Magistrate, but the appellant had consented to be searched by him. Under the circumstances, it cannot be said that the mandatory provisions of Section 50 of the NDPS Act were not complied with by the Investigating Officer, or that, on that ground, the appellant was entitled to be acquitted. Similar view is taken by the Honourable Supreme Court in Sayar Pura vs. State of Rajasthan, (1998) 7 Supreme Court Cases 441. Following the principles laid down by the Honourable Supreme Court in the abovereferred to decision, we hold that the appellant has failed to point out that there was breach of requirement of Section 50 of the NDPS Act and, therefore, he should be acquitted.

6. The contention that search was made without

complying with the provisions of Section 42 of the NDPS Act has no substance. The evidence on record shows that the appellant was found to be in possession of opium on public road. In such circumstances, the provisions of Section 42(2) of the NDPS Act, was not required to be followed in view of the decision rendered in the case of Sayar Pura (supra). Therefore, the appeal cannot be allowed on the ground that the provisions of Section 42 of the NDPS Act were not complied with by the Investigating Officer.

7. The contention that there is breach of provision of Sections 52, 55 and 57 of the NDPS Act, and, therefore, the appellant should be acquitted, has no substance. It is not pointed out by the learned counsel for the appellant as to which requirement of abovereferred to provisions is not complied with by the prosecution. Section 52 provides for disposal of persons arrested and articles seized. Section 52(1) requires that any officer arresting a person under Section 41, Section 42, Section 43 or Section 44, shall, as soon as may be, inform him of the grounds for such arrest. It is not the case of the appellant that he was not informed of the grounds of arrest by Mr. Gohil at the time when he was arrested. The evidence on record clearly establishes that the appellant after arrest was forwarded without unnecessary delay to the Officer In-charge of the nearest police station. Therefore, in our view, there is no breach of any of the requirements of Section 52 of the Act. Section 55 requires the police to take charge of articles seized and delivered. The evidence of Mr. Gohil read with evidence of Mr. Amarsinh Motisinh, Police Station Officer, Anand Rural Police Station, proves that the Officer Incharge of the police station had taken charge of and kept in safe custody articles which were seized under the NDPS Act. The evidence of Amarsinh Motisinh further indicates that the sealed cover was handed over to crime writer, Babubhai, for the purpose of despatching the same to the Forensic Science Laboratory. The report of the Forensic Science Laboratory indicates that the sample received was in sealed condition and intact. Thus, it is established that the sample was kept in safe custody and there was no possibility of it being tampered with before it was sent to Forensic Science Laboratory for analysis. Accordingly, we hold that the appellant has failed to point out breach of provisions of Section 55 of the NDPS Act. Moreover, the evidence of Amarsinh Motisinh clearly establishes that he had made report to the Divisional Police Officer on June 2, 1992 itself. Therefore, it is difficult to hold that the provisions of Section 57 of

the NDPS Act were not complied with the prosecution. The fact that the appellant was found in possession of opium on June 2, 1992 without permit or licence is amply proved. It is also proved that substance which was found from the possession of the appellant is opium and, therefore, in our view, conviction of the appellant under Section 18 of the NDPS Act, is well founded. The appellant has not made out any ground to interfere with the order of conviction recorded by the learned Additional Sessions Judge and, therefore, the appeal is liable to be dismissed.

8. For the foregoing reasons, the appeal fails and is dismissed. Muddamal is ordered to be disposed of in terms of the impugned judgment.

(swamy)